

1 Tribal Police went to Defendant's house to interview him about the November 14 incident.
2 Nez and Defendant waited for Criminal Investigator Michael Begay to arrive. When Begay
3 arrived, all three men got into his vehicle. At 10:22 a.m., Nez and Begay began interviewing
4 Defendant about the events on the night of November 14 and the afternoon of December 17.
5 The interview was recorded. Neither officer informed Defendant of his *Miranda* rights. The
6 interview lasted thirty-nine minutes, and concluded at 11:01 a.m.

7 Defendant has moved that any statements made in the January 3 interview be
8 suppressed because the interview was conducted in violation of his Fifth and Sixth
9 Amendment rights. In its response, the government mentioned the statements Defendant
10 made when he was arrested on December 17, which Defendant now states should be
11 suppressed as well.

12 ANALYSIS

13 No one "shall be compelled in any criminal case to be a witness against himself." U.S.
14 CONST. amend. V. In order to protect this right, "the prosecution may not use statements,
15 whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant
16 unless it demonstrates the use of procedural safeguards effective to secure the privilege
17 against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1965). These procedural
18 safeguards ordinarily take the form of warnings given by law enforcement officers prior to
19 a custodial interrogation: that a suspect may remain silent, that anything he says will be used
20 against him in court, that he is entitled to an attorney, and that an attorney will be provided
21 by the state should he not be able to afford one.¹ *Id.* These warnings, however, "are due only
22 when a suspect interrogated by the police is 'in custody.'" *Thompson v. Keohane*, 516 U.S.
23 99, 102 (1995). In order for police to have a person "in custody" short of effecting an actual
24 arrest, "something must be said or done by the authorities, either in their manner of approach
25 or in the tone or extent of their questioning, which indicates that they would not have heeded

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27 ¹ Under the law of the Navajo Nation, indigent criminal defendants are not provided
28 with counsel, so the warnings Defendant received on November 14 did not include the right
to have counsel provided for him.

1 a request to depart or to allow the suspect to do so.” *U.S. v. Beraun-Panez*, 812 F.2d 579, 580
2 (9th Cir. 1987) (quoting *U.S. v. Hall*, 421 F.2d 540, 545 (2d Cir.1969)). The determination
3 of whether a person was free to leave is based “on the objective circumstances of the
4 interrogation, not on the subjective views harbored by either the interrogating officers or the
5 person being questioned.” *Stansbury v. California*, 511 U.S. 318, 323 (1994). Subjective
6 criteria, such as the subject’s age, education, intelligence, or previous experience with law
7 enforcement, are not relevant to whether a reasonable person would feel free to leave, and
8 therefore to whether a particular suspect is in custody. *See Yarborough v. Alvarado*, 541 U.S.
9 652, 668 (2004) (“Indeed, reliance on Alvarado’s prior history with law enforcement was
10 improper not only under the deferential standards of 28 U.S.C. § 2254(d)(1), but also as a *de*
11 *novo* matter.”).

12 In the Ninth Circuit, the factors relevant to whether an accused is “in custody” include
13 the following: “(1) the language used to summon the individual; (2) the extent to which the
14 defendant is confronted with evidence of guilt; (3) the physical surroundings of the
15 interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to
16 detain the individual.” *U.S. v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001). These factors
17 are not exhaustive and “[o]ther factors may also be pertinent to, and even dispositive of, the
18 ultimate determination whether a reasonable person would have believed he could freely
19 walk away from the interrogators.” *U.S. v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

20 For *Miranda* to apply, the statements must not only be made while the subject is “in
21 custody” but also must be the product of an interrogation. *Rhode Island v. Innis*, 446 U.S.
22 291, 300 (1980). Police interrogation refers “not only to express questioning, but also to any
23 words or actions . . . that the police should know are reasonably likely to elicit an
24 incriminating response from the suspect.” *Id.* at 301. Limited inquiries or requests for
25 biographical information do not constitute interrogation unless they “play upon the fears and
26 weaknesses of a defendant in a manner that amounts to interrogation because it is coercive
27 in nature.” *U.S. v. Foster*, 227 F.3d 1096, 1103–04 (9th Cir. 2000).

28 Although a statement made during a custodial interrogation in which a defendant was

1 not appraised of his *Miranda* rights may not be used in the prosecution's case in chief, it is
2 admissible for impeachment so long as "the trustworthiness of the evidence satisfies legal
3 standards." *Harris v. New York*, 401 U.S. 222, 224 (1971). On the other hand, "any criminal
4 trial use against a defendant of his *involuntary* statement is a denial of due process of law."
5 *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (emphasis in original). The prosecution has the
6 burden of demonstrating that a confession is voluntary. *Brown v. Illinois*, 422 U.S. 590, 604
7 (1974). A suspect's statement is not voluntary unless it is "the product of his free and rational
8 choice." *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968). To determine whether a
9 statement was voluntary, a court considers whether, under "the totality of the circumstances,
10 the government obtained the statement by physical or psychological coercion or by improper
11 inducement so that the suspect's will was overborne." *U.S. v. Leon Guerrero*, 847 F.2d 1363,
12 1366 (9th. Cir. 1988). In contrast to the custodial determination, the question of voluntariness
13 is subjective and may properly depend upon "the characteristics of the accused," including
14 age, education, intelligence, and experience with law enforcement. *Schneckloth v.*
15 *Bustamonte*, 412 U.S. 218, 226 (1973); *see also Lynum v. Illinois*, 372 U.S. 528, 534
16 (1963).

17 The Sixth Amendment guarantees the right to counsel during criminal proceedings.
18 U.S. CONST. amend VI. The right attaches "at or after the time that judicial proceedings have
19 been initiated against him 'whether by way of formal charge, preliminary hearing,
20 indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S.387, 398 (1977)
21 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

22 **I. Miranda**

23 Defendant asserted his *Miranda* rights when he was arrested on November 14, and no
24 statements were taken from him at that time. Invocation of *Miranda*, however, lapses two
25 weeks after a suspect is released from custody, so Defendant's assertions were not applicable
26 to any interaction after November 29, two weeks after he was released. *Maryland v. Shatzer*,
27 130 S.Ct. 1213, 1223–24 (2010).

28 On December 17, Defendant was intoxicated and sitting in a chair in front of his house

1 when he was approached by Officer Begay and another armed officer. Defendant made
2 statements regarding his state of mind and other matters. The officers were armed and in
3 uniform when they approached him, and they arrested him after he made the statements.
4 Nevertheless, Defendant made the statements spontaneously, without being asked any
5 questions about the November 14 shooting. The statements were therefore not the result of
6 an interrogation, and *Miranda* warnings were not required. *Innis*, 446 U.S. at 300. Even if
7 Officer Begay made some preliminary statements to Defendant, although he claims credibly
8 that he did not, there is no suggestion that he asked questions about the November 14
9 shooting incident. Nothing suggests that Officer Begay's conduct "amount[ed] to
10 interrogation because it [was] coercive in nature." *Foster*, 227 F.3d 1103–04.

11 In contrast, the January 3, 2011 incident was an interrogation. To determine whether
12 Defendant was "in custody" during that interrogation, the Court will consider the five factors
13 set forth in *Hayden*. These factors and other facts surrounding the encounter are to be
14 considered objectively. *Stansbury*, 511 U.S. at 323. The fact that Defendant had been issued
15 *Miranda* warnings when he was arrested on November 14 may be relevant to whether his
16 statements were voluntary, but is not a factor to consider when determining whether he was
17 "in custody." *Alvarado*, 541 U.S. at 668.

18 The language used to summon Defendant suggests that Defendant was not in custody.
19 Although investigator Nez identified himself as a law enforcement officer and asked
20 Defendant to talk about the shooting on November 14, he did not order Defendant into the
21 vehicle or use physical force to get him to comply. He informed Defendant that he was not
22 under arrest. The language used to summon Defendant weighs against a finding that he was
23 "in custody." See *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (suspect who
24 responded to request that he come to police station for questioning not "in custody" during
25 half-hour interrogation).

26 During the interrogation, however, Nez twice confronted the Defendant with evidence
27 that contradicted his statements. At one point, Nez informed Defendant that pistol bullets had
28 been recovered from the crime scene, and asked if anyone had a pistol. Defendant responded

1 that he thought one of the members of the other group had one. Nez replied that he had
2 spoken to a member of Defendant's group, named Jerrick, and continues, "Jerrick says you
3 gave him that pistol. Is that a true statement on Jerrick's part? He says when the fight was
4 about to start you gave him that pistol." Furthermore, although the general tone of the
5 interview was cordial, periodically Nez prodded Defendant to tell him the truth, or suggested
6 that Defendant was required to compose a response in his own words, saying , "You gotta
7 tell me," or "I want you to say it." Nez repeatedly challenged Defendant's version of events
8 or his veracity. The statements and evidence officers provided, however, can only moderately
9 be considered "evidence of guilt," and therefore the second element weighs only moderately
10 in favor of custody. *See Beraun-Panez*, 812 F.2d at 579 (defendant was presented with
11 evidence of guilt when officers "told him that witnesses had placed him at the scene").

12 Regarding the physical surroundings, Defendant was inside a police vehicle, with an
13 officer in the driver's seat and another in the rear seat. Although the government emphasizes
14 that both officers were in plainclothes and the vehicle was unmarked, it does not allege that
15 Defendant did not understand them to be law enforcement officers. Indeed, Nez had shown
16 Defendant his badge, and spoke to Defendant about the conditions under which Defendant
17 may be arrested. Although Defendant may have willingly entered the vehicle, once he was
18 inside, the physical surroundings gave the appearance of being custodial. He was not, for
19 example, in his own home or place of business speaking to police officers. *See U.S. v.*
20 *Bassignani*, 575 F.3d 879, 885 (interview conducted at conference room at suspect's place
21 of business not custodial). In *U.S. v. Lee*, the Ninth Circuit found that a suspect confronted
22 with inconsistencies in his statements while sitting in a police vehicle parked in front of his
23 house was "in custody" even though he was "not forced into the car" and was affirmatively
24 told he was free to leave. 699 F.2d 466, 468 (9th Cir. 1982). There are very few meaningful
25 distinctions here. The physical surroundings weigh in favor of a finding that Defendant was
26 in custody.

27 The duration of the detention here weighs against a finding that the interrogation was
28 custodial. The recorded interview lasted only thirty-nine minutes, and the actual interview

1 time, as opposed to time taken to obtain fingerprints, was only a few minutes more. The
2 Ninth Circuit has held interviews lasting more than an hour to be non-custodial. *U.S. v.*
3 *Crawford*, 372 F.3d 1048, 1052 (9th Cir. 2004). Although not dispositive, the length of the
4 interview suggests that it was not custodial.

5 Whether officers tell a suspect that he is under arrest or free to leave is highly relevant
6 to the fifth factor in the *Hayden* inquiry. *See, e.g., U.S. v. Norris*, 428 F.3d 907, 912 (9th Cir.
7 2005) (suspect not in custody when told that he was not under arrest and that “his
8 cooperation was voluntary and that he was free to terminate the interview at any time.”).
9 Here, Nez emphasized to Defendant that he was not under arrest, stating that “you’re not
10 being arrested,” and that “if you’re gonna get arrested, it’s gonna happen later.” However,
11 Nez did not tell Defendant he was free to leave. On the contrary, he said, “Whatever you say,
12 *at the end of this interview*, you’re going to go back to your house, we’re going to drive
13 away.”(emphasis added). The Ninth Circuit has found that such a statement, made in a
14 familiar setting, does not create a custodial interrogation. *Bassignani*, 575 F.3d 879, 886 (9th
15 Cir. 2009). Nevertheless, in a setting very similar to the case at hand, where a suspect had
16 entered a police vehicle voluntary and was interviewed in the vehicle near his home, the
17 interview was custodial despite the fact that officers had informed the suspect that he was
18 free to leave. *Lee*, 699 F.2d at 468.

19 The totality of the circumstances here cannot be distinguished from *Lee*, which
20 therefore controls the outcome. Defendant was in a police vehicle, with an officer to his left
21 and another behind him. The officers were asking questions about a crime, and providing
22 statements and other evidence that contradicted statements made by the Defendant. Although
23 the officers here did not confront Defendant with evidence as aggressively here as the
24 officers in *Lee* did, here the officers never overtly stated that Defendant was free to leave, as
25 they had in *Lee*. Although the Defendant in *Lee* was interrogated in the police vehicle while
26 other officers searched his house, the Ninth Circuit there relied on the circumstances in the
27 police vehicle, rather than the house, to determine that the interrogation was custodial. Here
28 too, then, the interrogation was custodial, and the statements in the car must be suppressed

1 under *Miranda*. See *Lee*, 699 F.2d at 468.

2 **II Voluntariness**

3 Determining whether a statement is voluntary “requires careful evaluation of all the
4 circumstances of the interrogation.” *Mincey v. Arizona*, 437 U.S. 385, 401 (1978). The
5 recording of the interrogation demonstrates that it was not accompanied by “physical or
6 psychological coercion or by improper inducement so that the suspect’s will was overborne.”
7 *Leon Guerrero*, 847 F.2d at 1366. Defendant was not promised leniency in exchange for
8 making a statement; he was not subject to violence; he was not lied to. Nez frequently tells
9 Defendant that he must be honest, but “repeated exhortations to tell the truth do not amount
10 to coercion.” *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir.1997). When asked “Is it
11 okay if I have another question, I can come back here and ask you again?” Defendant
12 answered affirmatively. When Nez asked to fingerprint Defendant, Defendant granted him
13 permission. Defendant’s statements were made voluntarily.

14 Defendant also claims that his statements on December 17, 2010 were involuntary and
15 must be suppressed because he was intoxicated. Ordinary intoxication falls far short of the
16 condition that rendered a severely injured hospital patient’s confession involuntary in
17 *Mincey*. There, the suspect was “depressed almost to the point of coma,” and “was being
18 questioned [while] he was lying on his back, on a hospital bed, encumbered by tubes,
19 needles, and breathing apparatus.” 437 U.S. at 399. Neither Defendants’ statements on
20 December 17 nor his statements of January 3 were involuntary. Since the December 17
21 statements were not obtained in violation of *Miranda*, the government may use them in its
22 case in chief. Since the January 3 statements were obtained in violation of *Miranda*, they may
23 not be used in the government’s case in chief, but may be used for other purposes. *Harris*,
24 401 U.S. at 224.

25 **III. Sixth Amendment**

26 Defendant was not indicted until March 8, 2011, so his Sixth Amendment rights had
27 not attached during the incident on January 3, 2011. *Brewer*, 430 U.S. at 398. The statements
28 will not be suppressed under the Sixth Amendment.

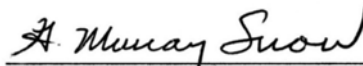
1 **CONCLUSION**

2 Defendant's statements on December 17 were made prior to any "interrogation" and
3 were therefore not obtained in violation of *Miranda*, and may be used by the government at
4 trial. He was "in custody" for the purposes of *Miranda* when he was interrogated on January
5 3, 2011, and statements made then may not be used in the government's case-in-chief. The
6 January 3 statements were, however, made voluntarily, and, if appropriate, may be used for
7 other purposes. Defendant's Sixth Amendment rights had not attached during either incident
8 and therefore were not violated.

9 **IT IS THEREFORE ORDERED:**

- 10 1. Defendant's Motion to Suppress (Doc. 34) is **granted in part** and **denied in**
11 **part.**
- 12 2. Defendant's statements on December 17, 2010 may be introduced at trial.
- 13 3. Defendant's statements on January 3, 2011 may not be introduced by the
14 government during its case-in-chief.

15 DATED this 14th day of November, 2011.

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18 G. Murray Snow
19 United States District Judge
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